

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No: 1:20cr183-1/2/4/5/6

vs.

ADAM DEAN FOX,
BARRY GORDON CROFT, JR.,
KALEB JAMES FRANKS,
DANIEL JOSEPH HARRIS and
BRANDON MICHAEL-RAY CASERTA,

Defendants.

Before:

THE HONORABLE ROBERT J. JONKER
U.S. DISTRICT Judge
Grand Rapids, Michigan
Thursday, September 17, 2021
Motion Proceedings

APPEARANCES:

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REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

09/17/2021

(Proceedings, 10:01 a.m.)

THE CLERK: The United States District Court for the Western District of Michigan is now in session. The Honorable Robert J. Jonker, chief judge, presiding.

THE COURT: All right. Please be seated everyone and welcome. We're here on the case of the United States against Adam Fox and others, 1:20cr183. And let's start with appearances, please.

MR. KESSLER: Good morning, Your Honor. Nils Kessler and Austin Hakes for the United States.

THE COURT: All right.

MR. HILLS: Michael Hills on behalf of Brandon Caserta, who is sitting to my right.

THE COURT: All right.

MR. GRAHAM: Good morning, Your Honor. Scott Graham on behalf of Kaleb Franks, who is present.

MR. GIBBONS: Good morning, Your Honor. Christopher Gibbons on behalf of Adam Fox, who is seated to my left. And also present is my law partner, Ms. Karen Boer.

THE COURT: All right.

MR. BLANCHARD: Good morning, Your Honor. Josh Blanchard on behalf of Mr. Croft, who is seated to my right.

THE COURT: All right.

MS. KELLY: Good morning, Your Honor. Julia Kelly on

1 behalf of Daniel Harris. He is present and for the Court to my
2 right.

3 THE COURT: Thanks. Welcome everybody. The matter
4 noticed for hearing is the joint Defense motion for an ends of
5 justice continuance, so that's what I certainly want to talk
6 about. I do know that before that motion got filed and
7 scheduled for hearing Mr. Gibbons, I think it was, had
8 suggested a status conference that would allow the Court -- the
9 parties to work a little bit with the logistics of anticipated
10 trial presentations, and I had originally scheduled that
11 earlier this week for just counsel and the Court since I didn't
12 anticipate any substantive issues. When this came up I
13 thought, well, maybe we'll just have everybody together anyway.
14 We have to talk about the motion, and if there are other things
15 that would be useful we can take that up as well.

16 When I think about the motion for ends of justice, you
17 know, obviously in a big case like this with lots of discovery,
18 lots of Defendants, lots of moving parts, we have to give
19 everybody time to be prepped. On the other hand, and
20 especially when the Government says, well, we don't see any
21 prejudice to our case -- we don't think we are responsible for
22 it, but we don't see any prejudice, it's tough for the Court to
23 get out in front of that and say, yeah, but I want you all here
24 anyway.

25 At the same time, we've already been at this about a

1 year or so. We've got five Defendants waiting in custody.
2 There is always a last minute push. I get that. You know, we
3 are a week away or so from final pretrial and about a month
4 away from trial. I really need to understand what it is from
5 the Defense point of view that they see as actual material
6 prejudice, and I'm sure I'll hear about that today.

7 When I read the motion papers, most of the specific
8 paragraphs are focused on the need to get hours of tape
9 transcribed. I think 25 hours or so, and I get that, though I
10 imagine people are moving forward on that. There is one expert
11 issue that involves the expert that Mr. Hills had identified
12 who may not testify according to the motion papers. When I
13 went back and looked at the details on the authorization it
14 wasn't clear to me from that that there was ever anticipated
15 testimony from that individual as opposed to consulting. And
16 then I did get today another ex parte submission which would be
17 a proper way for the Defense to submit a different expert
18 issue. I won't talk about that in open court. So that's new
19 to the table, and I also saw last night that there was an
20 appeal filed from the Magistrate's decision on one of the
21 discovery motions. So that's new.

22 But I want to make sure if we do have to move this,
23 that there is a clear understanding of why, what it is
24 specifically that we are trying to avoid so we don't just get
25 up to the next deadline and get another effort to reset the

1 clock. That worries me. I'm also worried that if we reset it
2 for 90 days we are in the middle of January, which is a
3 terrible time to start a four-week trial in Michigan. We
4 always have weather disruptions and we have jurors that come
5 from as far as the bridge. That's not an easy logistical
6 concern and it's not something we have to worry about typically
7 in October, and there is plenty of other things to worry about
8 in getting a fair jury seated in a case like this. I really
9 don't want weather to be one of them, and so I worry that if we
10 do the ends of justice it can't really be to the middle of
11 January. It's more likely, you know, till the end of February
12 at the earliest, and then we kind of cross our fingers and hope
13 from a weather point of view.

14 So those are the things that are turning around in my
15 mind. I don't know who wants to start speaking on behalf of
16 the moving parties, but Mr. Graham, I think you signed the
17 motion. I know everybody else will have their individual take
18 but why don't I start with you and go from there.

19 MR. GRAHAM: Your Honor, the papers before the Court
20 essentially, I think, talk about kind of two issues. One, what
21 do the Defendants need, and I guess a secondary point is does
22 the Government have any responsibility? I am not worried about
23 the Government responsibility. It's an incredibly difficult
24 case to provide discovery on. I would note, the first specific
25 discovery request went to the Government in October of 2020,

1 outlining all the categories of things that we wanted. I would
2 note that, but that's not my, I guess from my perspective, was
3 not the primary issue. The primary issue is can the Defendants
4 be prepared?

5 So at least from my perspective as a starting point
6 you have noted transcription issues, and I think that those are
7 not only very important, not only very challenging here, but
8 there is a reason why they are especially challenging, and that
9 is that the recordings in question fall into a number of
10 different categories, but one category would be recordings
11 where the audio quality is poor, recordings that occur may be
12 in a car.

13 THE COURT: Usually the Defense likes that, because
14 the Government has the burden of proof, so if you can't hear
15 anything on the tape it can't be very material evidence.

16 MR. GRAHAM: I agree completely, and it's an unusual
17 case where the things that are said are actually favorable to
18 the Defense.

19 THE COURT: Then you've got a different problem.

20 MR. GRAHAM: Sure.

21 THE COURT: Then you've got a hearsay problem
22 depending on who the speaker is.

23 MR. GRAHAM: Yes, and depending on who the speaker is,
24 and then we've got, I think, a third problem, which is the
25 unique aspect of when you -- when a Defendant raises the

1 defense of entrapment, Does that change, you know, the Rule 104
2 analysis? So a lot of things, and there are a lot of moving
3 parts in that issue alone. But the starting point seems to me
4 to be having a clear and stipulated version of what was said on
5 that transcript. So you've got multiple speakers in moving
6 cars. You've got -- and then another problem, let's say --
7 because you are going to hear this over and over again. Say
8 you've got a number of people standing outside talking. Maybe
9 10 or 12 people. Some close to the -- you know, to the
10 recording device. Some not. And then often people talking
11 over each other. So these are unique to me difficult
12 recordings in order to work on transcription on.

13 Now, there is another issue here, Your Honor, which is
14 in a normal case we would get the Government's transcripts and
15 we would determine whether they are accurate or whether we
16 think they are accurate, and then we would determine, well, do
17 we need to try to supplement those with a few -- a few
18 straightforward recordings? That's not the case here. We have
19 not received any substantial amount of transcription that we
20 could piggyback on. So my point is simply that the transcript
21 problems are very, very significant and unique, I think,
22 compared to most cases, and so trying to get that done
23 becomes -- becomes a real problem.

24 I think that the Defendants have been working
25 diligently on that, and I suspect -- I have no reason to doubt

1 that the Government -- I'm sure they have been working
2 diligently on their transcripts. Things just haven't come to
3 fruition in terms of having those to offer to the parties, and
4 then ultimately the only thing that really matters is
5 ultimately offering those to the Court for use with
6 presentation to the jury. So transcripts are certainly a very
7 significant issue.

8 Another issue that I would flag would be the fact that
9 there are many witnesses located -- I am not going to say
10 throughout the country. That would be, I think, a bit
11 misleading. Certainly throughout the midwest and then maybe
12 working more to the east. Certainly the Court is aware that
13 there are a number of allegations regarding events occurring in
14 Delaware. There are allegations about events occurring in, you
15 know, Wisconsin, Ohio, Indiana, obviously Michigan, trying to
16 find witnesses, all of whom seem to be identified primarily by
17 either nicknames or screen names or who aren't identified at
18 all, which, you know, led to the reason why we are trying to
19 get some discovery regarding those people, is a real challenge
20 and a unique challenge. And again, we've been trying to obtain
21 that information -- the simple way is from the Government --
22 since October of 2020. We are working as hard as we can on
23 that. And so witness problems, I think, are somewhat unique in
24 this case.

25 I think that there are evidentiary problems that I

1 would have to admit to you, Your Honor, that we could resolve,
2 whether it's October 12th or, you know, whenever. Problems
3 such as something the Court mentioned. What happens when
4 statements are made by Defendants that normally would be
5 excluded under Rule 104 but might not be excluded where the
6 Defense is entrapment, statements made and tracked to FBI
7 handlers and confidential informants passed onto certain
8 Defendants? What's the -- you know, what's the role of those?
9 We could get that done in the form of motions in limine, I
10 agree, but still it's a challenge, and one that I think
11 everyone wants to have a good -- you know, good handle on.

12 One of the things we are trying to do is evaluate all
13 of the electronic devices. My understanding is that there are
14 electronic devices that have only been produced for the first
15 time this week. I am not sure how that happens but it does,
16 and that certainly creates a significant challenge.

17 The -- I would note for the Court that the procedure
18 for processing all discovery is, I think, one that is very
19 effective and efficient, but in this case because the Court did
20 appoint -- no secret the Court appointed, if you will, a
21 coordinating discovery attorney to help with that. That's been
22 very helpful, but it's a time consuming process, and it's time
23 consuming because, you know, discovery goes out to New York.
24 It gets processed. The Court is aware from various filings,
25 you know, some of the discovery came through with duplication

1 of key events, maybe as many as 15 or 20 duplicate insertions
2 into the discovery with different file names. Again, it's --
3 it's just kind of a unique situation. And when I say unique,
4 because I think it's important to get -- really drill down into
5 what the real problems with -- it's unique when, in my
6 experience, in my opinion, when discovery -- okay. An
7 investigation is going on, whether it's nationwide or parts of
8 the country or not, and agents are doing investigations. They
9 are getting tapes. They are doing reports. They are doing
10 interviews of many people, many confidential informants and
11 others throughout, we'll just say the midwest, and then the
12 time comes for discovery. There is a complaint and an
13 indictment, and I am assuming everything kind of gets pushed
14 into one spot and that's how you get 15 -- you know, 15 tapes
15 that are identical. So a unique problem based upon the
16 logistics of the investigation and the scope of the
17 investigation.

18 Your Honor, I think it's a matter of public record
19 that when this case started the State Police indicated this was
20 the largest investigation that at least current officials could
21 recall in the history of the State Police. That shows the
22 scope of just their -- you know, their investigation. We
23 haven't even, you know, touched on federal authorities. So
24 they are significant.

25 So we also have, Your Honor, a recent -- couple of

1 recent issues that have sprung up regarding what we think are
2 potential credibility issues for key Government witnesses that
3 we just learned about that we are trying to investigate, and we
4 are dealing with all sorts of hurdles in regard to the
5 production of information, documents, messages, posts, and so
6 we are attempting to deal with that.

7 In terms of -- in terms of experts, we have --

8 THE COURT: And I should indicate on the experts I
9 realize under 3006(a) those kinds of items are normally ex
10 parte. Obviously the Government is here. When the motion
11 specifically raises an expert issue I think it's fair to talk
12 about.

13 MR. GRAHAM: Sure.

14 THE COURT: There is the second issue that I flagged
15 that Mr. Gibbons submitted. It's still ex parte. If you don't
16 want to talk about that one in open court I understand it, and
17 we can put that to one side.

18 MR. GRAHAM: And I agree with you, Your Honor. So the
19 point is I guess we have been looking for experts from the
20 beginning. We've also, of course, tried to anticipate what are
21 the Government experts going to be because, you know, separate
22 issues about, if you will, affirmative experts and then, if you
23 will, rebuttal experts to the Government or whatever. The
24 Government expert disclosure occurred this week. I am not
25 quarrelling with that timing. It's just in this particular

1 case --

2 THE COURT: There hasn't been a Defense expert
3 disclosure yet?

4 MR. GRAHAM: That's correct, Your Honor.

5 THE COURT: Okay.

6 MR. GRAHAM: And so you know, we are trying to get
7 that figured out, and I guess the one thing that I am
8 comfortable noting for the Court -- I hope I don't step on
9 anyone's toes -- is this. As we talk with experts and we try
10 to get information about what we think happened here, why it
11 happened, what we can do about it from a defense perspective,
12 it is -- it's not so difficult to get experts to talk with us
13 but it's a real challenge to get experts who are willing to
14 testify, and I would just make that general statement just
15 because --

16 THE COURT: I don't want to go too far down that road.

17 MR. GRAHAM: Yeah.

18 THE COURT: Because I am not privy to what you are
19 talking with your experts about.

20 MR. GRAHAM: Sure.

21 THE COURT: And you know, a quote, willingness, end
22 quote, to testify can range from, I'm scared, to, I just don't
23 agree with your theory of the case.

24 MR. GRAHAM: Sure.

25 THE COURT: And I don't want to get into that in open

1 court.

2 MR. GRAHAM: Sure. And I understand, Your Honor, but
3 I would say it's what's been communicated to us is just because
4 of the publicity. Not, you know --

5 THE COURT: Right. But I mean, nobody has a way to
6 test that.

7 MR. GRAHAM: Right.

8 THE COURT: I can't test what you are telling me, and
9 the Government can't test what you are telling me. All I can
10 say is that, I don't have an expert disclosure, and then if
11 there is an ex parte submission I can weigh whether or not the
12 Defense ought to have another run at a different expert.

13 MR. GRAHAM: Sure. Sure.

14 THE COURT: But those are delicate issues.

15 MR. GRAHAM: Understood. And I won't say anything
16 more about them, but I said what I'm comfortable saying about
17 those and I understand -- I understand the Court's -- the
18 Court's point regarding that.

19 So as we look at -- as we look at transcription
20 relating, again, to audio -- and again, there is a problem, I
21 think, with audio that goes beyond mere transcription. Let's
22 assume we have identified for the Court -- I think we have some
23 25 hours of audio that we would like to transcribe. That comes
24 out of hundreds of hours of audio, and hundreds of hours of
25 difficult audio. For example, assume people load up in a car

1 and they drive for five hours, and --

2 THE COURT: Right. I get that. Is there a new point
3 on that?

4 MR. GRAHAM: No.

5 THE COURT: Because I think that's the one you started
6 with and I understand that.

7 MR. GRAHAM: So the scope of that becomes an issue.

8 Those are the things that I would highlight in terms
9 of the reasons why I think, you know, an EOJ would be
10 appropriate. As far as when -- at least my position on the
11 when, if -- you know, if the Court granted one is just whatever
12 the Court thinks is appropriate for the Court's schedule for,
13 you know, prospective jurors, et cetera. So I don't have
14 anything to add on that. So unless there are questions, I've
15 said what I wanted to say to the Court.

16 THE COURT: All right. Let me just drill down a
17 couple items that I am not totally clear on.

18 You said something about a new electronic device
19 disclosure this week, and I don't understand that. I had
20 thought all of the discovery had been out by what, end of
21 August maybe?

22 MR. GRAHAM: And I am going to have to defer to
23 Ms. Kelly on that.

24 MS. KELLY: Would the Court like me to address that
25 right now?

1 THE COURT: No. Mr. Graham mentioned that, and we'll
2 get the details from Ms. Kelly. It doesn't sound like you have
3 any new information on that.

4 MR. GRAHAM: No, I don't.

5 THE COURT: And the issue involving what we often get
6 under rule of completeness or otherwise with a statement of a
7 Defendant as hearsay if it's offered in support of the Defense,
8 how does the entrapment issue, if that's in play, change that?
9 Give me an example.

10 MR. GRAHAM: Okay. I'll give you an example. If, in
11 fact, the Court were to say it's our burden to demonstrate a
12 lack of predisposition.

13 THE COURT: Ultimately it's going to be the
14 Government's burden. There might be a Defense burden of
15 production --

16 MR. GRAHAM: Sure.

17 THE COURT: -- to get the instruction, but if I think
18 the instruction is warranted then I think the law is pretty
19 clear the Government has to disprove the entrapment beyond a
20 reasonable doubt. The question is, does the Defense have
21 enough evidence on both the agent push, so to speak, and lack
22 of predisposition?

23 MR. GRAHAM: Right. And regardless of what the
24 Court's ultimate ruling was, the example -- you asked me for a
25 specific example. I used the one that I have been talking

1 about with regard to my client for some time.

2 THE COURT: Okay.

3 MR. GRAHAM: The Government in its original complaint
4 cites specific language where in July of 2020 Mr. Franks says,
5 I am not into aggressive kidnapping. I am just here for the
6 training. So the question --

7 THE COURT: Well, the Government doesn't put that.
8 You are saying that's the statement you want to offer --

9 MR. GRAHAM: Yes.

10 THE COURT: And why shouldn't that be, if you use it
11 in evidence, subject to cross examination? How does that
12 change the hearsay analysis? It's still hearsay, isn't it?

13 MR. GRAHAM: I don't -- as we attempt to set a stage,
14 if you will, or show a circumstance or an event, I don't think
15 it's the same as mere, I didn't do it. The statements we
16 normally run into where we try to put something in where a
17 Defendant makes an admission and then as part of that statement
18 says, I didn't do it, I didn't do it, and of course, that's not
19 allowed. Admission by the Defense is not allowed. Here where
20 a predisposition through entrapment may fall in terms of the
21 burden of the Defendant, I think the starting point is for us
22 to evaluate and offer to the Court every statement of that type
23 that we want to make.

24 THE COURT: But every admissible statement. I mean,
25 that's the question, right? Is it admissible? And if it's

1 offered, you know, for the truth, then we'd be in the same
2 hearsay land we'd always be in it seems to me.

3 MR. GRAHAM: And I think from my perspective in an
4 entrapment case I don't think so.

5 THE COURT: All right. And I take it you have
6 authority you can present on that?

7 MR. GRAHAM: I believe so, yes. And I'm saying that
8 would be briefed whether we had an October 12th date probably
9 in the form of motion in limine.

10 THE COURT: All right.

11 MR. GRAHAM: You know, whether it -- whatever the date
12 was.

13 THE COURT: Okay. All right. Thanks.

14 MR. GRAHAM: Thank you.

15 THE COURT: Why don't we just go around. Ms. Kelly,
16 since we already touched on one of the items you are going to
17 provide additional information on, why don't we go to you next
18 and get your perspective on the EOJ and go around the table.

19 MS. KELLY: Thank you, Your Honor.

20 With respect to my client's phone, I had a
21 conversation with Mr. Kessler back in July that my client's
22 phone still had not been produced. That was prior to the
23 motion deadline filing date. Mr. Kessler assured me that I
24 would receive my client's phone records and that I need not
25 file a motion, so I did not file a motion. I received notice,

1 I think, two weeks ago that my client's phone had been
2 extracted -- the files had been extracted and that they would
3 make every effort to get my client's extracted phone records to
4 me. A hard drive was made available to me yesterday. I did go
5 over to the U.S. Attorney's Office. I picked that up. I tried
6 to load it onto my computer and it was approximately 25
7 gigabytes of discovery information. It was taking 91 percent
8 of my computer's memory just to try to load the program. So I
9 contacted the discovery coordinator. I sent that to her
10 overnight, and she's going to put it in a format where I can
11 search it.

12 I did speak to Mr. Hakes about the issues that I was
13 having. I can't imagine why it took this long to get my
14 client's phone to me. My client was arrested on October the
15 7th. He voluntarily provided his password to the Government
16 and they've had it. And I know that in April of this year they
17 looked through approximately 25 other devices that they took
18 from my client's home, finding no content. So I don't know why
19 it took until yesterday for me to receive that information.

20 So I do not have -- I don't have those in my
21 possession. I have not been able to review them. I do think
22 it would be material information that I would want to look at
23 and that my client has a right to look at in preparation for
24 trial, and so that was part of my joining of the EOJ, and I
25 have made my co-counsel aware that that is coming.

1 When I contacted the discovery coordinator she also
2 made me aware that on August the 30th the Government requested
3 another padlocked drive to be sent to them so they could
4 produce another set of discovery to us. She was out of the
5 country for two weeks. She did send that on Monday of this
6 week to the Government. That was received on Tuesday.
7 Mr. Hakes informed me he was not aware of the size of that
8 discovery but did believe that it contains information related
9 to other state defendants, other witnesses that were present at
10 these meetings, at these trainings, including Facebook records.
11 So I don't know what that is. I don't know how much that is.
12 That is discovery that is coming to us that we still do not
13 have. So I think those both would materially prejudice my
14 client given that I don't have it and next week is our final
15 pretrial conference.

16 The third and the fourth production that were sent to
17 us in August -- the third production I received on August the
18 18th. I personally was in a trial, a week long trial in state
19 court during that time. Reviewing that third production there
20 were something to the tune of 10,000 pages of e-mails from my
21 client from Newaygo County Jail to his family that I have to
22 sift through, and those were just two files on that third
23 production. So taking the time to review those is certainly a
24 lengthy process, and again, with the discovery still coming
25 that we don't know how big it is, on top of the 25 gigs of my

1 client's own extracted files.

2 The expert issue I just wanted to touch on.

3 THE COURT: And same caution to you.

4 MS. KELLY: Sure.

5 THE COURT: I don't want you to feel compelled to
6 discuss in open court anything you think would be compromising.

7 MS. KELLY: Sure. I think just to point out to this
8 Court, my client is charged in all four counts, and there are
9 certainly issues that we have been talking with experts and
10 trying to have someone available to talk about certain issues.
11 To have an expert say that they are no longer willing to be
12 able to testify certainly puts us back to square one and kind
13 of in reaching out to different experts who would be willing to
14 come forward and testify.

15 THE COURT: All right. Let me just follow. That is
16 the -- you are talking about the expert that is referenced in
17 the public motion?

18 MS. KELLY: That's correct, Your Honor.

19 THE COURT: At least when I went back to look at the
20 statements, it was at least by my reading a consulting expert.
21 You can always have a consulting expert I suppose develop into
22 a testifying one, but that wasn't clear to me from the original
23 request.

24 MS. KELLY: And I think with this budgeting case,
25 because the case is in phases, the idea was to retain someone

1 that can consult with us to turn into a testifying witness that
2 we would then in our phase two budgeting apply for that.

3 THE COURT: I see. Okay.

4 MS. KELLY: And just briefly, Your Honor, with respect
5 to the Government's response not objecting to our motion, and I
6 spoke to Mr. Kessler about this issue. Mr. Kessler brought up
7 in his filing about the missing media files, and that no
8 Defendant had made an appointment to look at certain pole
9 camera videos, that other media files were related to CHS, and
10 that files 80 and 119 were produced on May 3rd. I actually did
11 e-mail Mr. Kessler prior to the Defenses' joint filing
12 requesting information about these specific files. On January
13 25th, 2021, I was not even appointed on this case. I wasn't
14 appointed until February, and the first discovery that I
15 received on this case was in April. So from April until
16 whenever I received my client's extracted phone files I have
17 gone through about 3.4 terabytes I think is what we are looking
18 at right now. So it's an incredible amount of discovery. And
19 with that I would submit to the Court. Thank you.

20 THE COURT: All right. Thanks, Ms. Kelly.

21 We need some assistance to make sure the audio bridge
22 is working. We do have a number of people who are
23 participating via audio bridge. Something we've been able to
24 do since the pandemic, really, and so you just saw Mr. Van Dyke
25 walk in because he's got to do some troubleshooting. That's

1 what is happening.

2 Before we go to the other Defense counsel, let me just
3 shift over to Mr. Kessler on this issue of where we are in the
4 discovery, and particularly the recent phone submission that
5 Ms. Kelly just talked about. Can you give me your perspective
6 on that and what, if any, discovery -- I am not talking about
7 Jencks and all of that, but true discovery, do you think is
8 left to go, if any?

9 MR. KESSLER: Yeah. On the phone issue, that was one
10 particular phone that -- the Court is probably familiar with
11 the term CART. That's the FBI experts who extract these
12 things. They weren't able to do an extraction from that
13 particular phone. And the reason why this came up later than
14 the other phones is they finally got some software that enabled
15 them to do the extraction, which is -- which we notified them
16 about. So they have gone ahead and done that extraction. We
17 have now provided that to the Defense. It would not take that
18 long to go through it, honestly. There is not much on there
19 that is all that pertinent to the case other than some text
20 messages which wouldn't take that long to read. I understand
21 that's a large file because that's everything that was on the
22 Defendant's phone. People keep a lot of things on their phone.
23 But I think Ms. Kelly and anybody else who was in that
24 situation could sit down with their client whose phone it was
25 and with their assistance -- it's not like starting completely

1 from scratch. There is just not that much on it that's
2 pertinent to the case.

3 THE COURT: Are there other phones or devices like
4 that that you haven't been able to extract yet for whatever
5 reason?

6 MR. KESSLER: That's the only one I am aware of.

7 THE COURT: Okay. So other than that which apparently
8 Ms. Kelly got yesterday or earlier this week, are there other
9 anticipated discovery submissions you see coming yet or do you
10 feel like you have everything handed over?

11 MR. KESSLER: There is never really an end, honestly,
12 because we are continuing to investigate the case, and the
13 longer it goes on the more people -- you know, as we prepare
14 for trial we are running down loose ends. We are interviewing
15 new witnesses, tracking down additional things. And we
16 understand we have a continuing Rule 16 discovery obligation,
17 so we are going to turn those things over as they come in. I
18 don't anticipate much more after -- there is this last batch
19 that will go to them, and then we have just the Jencks and
20 Giglio type of stuff that we have discussed with the Court.
21 And then, again, like I said, if we go out and interview a
22 witness they prepare a 302 of that interview. We'll turn it
23 over. All right. We are going to continuing investigating.

24 THE COURT: All right. Hold on just a second. Okay.
25 We'll take a little break now so Mr. Van Dyke can get the audio

1 bridge working.

2 (Off the record, 10:33 a.m.)

3 (On the record, 10:34 a.m.)

4 THE COURT: All right. Thank you, Mr. Van Dyke. It
5 always makes me grateful I don't make my living on technology
6 because somebody that can do that under pressure is wonderful.
7 Thanks very much.

8 Okay. Did you get a chance to finish what you were
9 going to say?

10 MR. KESSLER: Yes, Your Honor.

11 THE COURT: Why don't we move over to the next Defense
12 lawyer who wants to be heard.

13 MR. GIBBONS: I can do that, Your Honor.

14 THE COURT: Go ahead, Mr. Gibbons.

15 MR. GIBBONS: Thank you.

16 Your Honor, without trying to cover ground that's
17 already been covered, with respect to myself and the joint
18 Defense team I have kind of taken the lead in organizing and
19 controlling the transcript issue. Like Ms. Kelly, I was
20 appointed in February. Effectively the discovery was produced
21 the first week of April to my office. I made it my point that
22 the sizable amount of discovery was not going to be an
23 impediment to an October 12 trial date. We have spent as much
24 time as we possibly could digesting, analyzing and sifting
25 through the discovery. It became apparent to me early in the

1 case that the transcripts were going to be an absolutely
2 critical item for any presentation of a defense, entrapment or
3 otherwise. If the defense is simply this didn't happen, there
4 wasn't a plan, transcripts are still an issue for the Defense.

5 As the Court is aware and has probably heard until
6 your ears are ringing, there has been over a thousand hours of
7 audio to sift through. We did get through that audio by
8 midsummer. We had attempted to use an economical attempt at
9 using a computer web-based transcription service. That was
10 becoming problematic. My concern is, I just want to see things
11 done.

12 We are in a position now, as the Court is aware, with
13 having a certified court reporter who is assisting us. She is
14 working her way through that material. I see no way that that
15 material can be accumulated -- can be transcribed prior to the
16 trial date at the current rate. I do know that the court
17 reporter has dedicated pretty much most of her effort
18 professionally to this project.

19 In order to enhance the effectiveness of the
20 transcripts, my partner and I again are going through the audio
21 that we've already gone through and identified and clipped,
22 plus the audio of joint Defense counsel. So we are trying to
23 par it down. We are trying to keep it effective and
24 economical, but from my perspective, I don't see us having
25 usable transcripts.

1 I understand the Court's concern about hearsay. There
2 are exceptions to the hearsay rule that would allow some of the
3 statements made by my client that I would be interested in off
4 these audio clips if there are exceptions that remove it from
5 the hearsay rule. It could be advanced either in response to
6 the Plaintiff's case in chief or during my client's case in
7 chief. Certainly prior consistent statements are an exception
8 to the hearsay rule.

9 THE COURT: If the person is testifying. If the
10 person is testifying.

11 MR. GIBBONS: If the person is testifying. My client
12 may well testify at trial. Obviously that decision hasn't been
13 made, but given the nature of the proceeding, that's something
14 that may happen.

15 THE COURT: All right. And no one disputes that if
16 there is an exception to the hearsay rule, that it applies to a
17 piece of evidence, the piece of evidence comes in. I am just
18 trying to imagine what kinds of exceptions there would be in
19 your mind other than, of course, a testifying expert who is
20 impeached and then a prior consistent statement.

21 MR. GIBBONS: A statement as to then existing state of
22 mind, present sense impression. So there are any number of
23 exceptions I think that could be satisfied that would allow the
24 affirmative use of a transcript. And of course, there is
25 always impeachment, Your Honor, which as you are entirely

1 probably aware at this point the Defense intends to focus a lot
2 of its energy on the conduct of the undercover agents and the
3 investigators in this case. So hearsay would not necessarily
4 be an issue if it comes to challenging someone for impeachment
5 purposes.

6 And the other thing that I wanted to make -- to say to
7 the Court is in looking at all of the discovery that has -- we
8 have two drives that came in August. I have a drive on my desk
9 that we received on August 30th. In all frankness, haven't
10 really had a chance to even open it. I mean -- and we are
11 working every day, full days. We have -- we are preparing for
12 trial and attempting to wrap up the little bit of audio that
13 still remains to be heard and everything else. It's just
14 gotten to the point, I think, from my perspective as counsel
15 for Mr. Fox, that we can go to trial on October 12th. We can
16 try anything with any type of preparation I suppose. I have
17 been a lawyer for 30 years. I have tried cases with just a
18 folder and five minutes notice from a court who has asked me to
19 step in. I don't want to do that in this case. I want to give
20 Mr. Fox a presentation that is full and fit. I think we can do
21 that.

22 I understand the Court's concern about a January
23 restart and I would not argue with that idea. My client
24 understands that this adjournment comes at his expense. He has
25 to sit in the Newago County Jail until this trial occurs. This

1 is not light duty for my client at this point. He is
2 willing -- and I have counseled him, hey, if you want to go,
3 we'll go, but I have given him some reasons why I think it
4 would be in his best interest that we seek additional time to
5 prepare and to have a fully fleshed out Defense presentation.
6 My client is in agreement with that opinion and is supportive
7 of the ends of justice continuance, and so that's all I have to
8 say.

9 THE COURT: All right. Thanks, Mr. Gibbons. One
10 followup. You say there is no way you believe at the current
11 rate you could have your transcripts ready by the current trial
12 date. When do you think they'd be ready?

13 MR. GIBBONS: Based on the current rate I think that
14 they would be done in mid-December.

15 THE COURT: I see.

16 MR. GIBBONS: They will be finished and ready to be
17 put in our trial presentation stack.

18 THE COURT: All right. Thank you.

19 MR. GIBBONS: Thank you.

20 THE COURT: Mr. Hills, go ahead. We'll go with
21 Mr. Blanchard. That's fine. He was first up.

22 MR. BLANCHARD: So I suppose I got into this case in
23 between some of the other lawyers. Mr. Croft was in the, you
24 know, October 7 arrest, but it took a long time to get him to
25 the district and so that slowed my preparation a little bit.

1 There is, I think the Court is aware, a tremendous
2 volume of discovery. I put it at a little over 150,000 pages
3 of documentary discovery that's split over about 24,000
4 documents. We are making good progress on the Croft team on
5 that. We are not through all of it, and I don't know how much
6 more is in this dump that I learned about yesterday that's
7 working its way through the coordinator of discovery.

8 THE COURT: Just so we're clear about what the dump
9 is, we're talking about the Harris phone?

10 MR. BLANCHARD: I think included with that. The
11 Harris phone was produced directly to Ms. Kelly. Apparently in
12 August the Government asked the coordinating discovery attorney
13 to send back an encrypted drive to the Government, a two
14 terabyte encrypted drive. We don't know the size of what they
15 are putting on it. My understanding is this is sort of a
16 telephone game, but what I'm hearing through my Co-Defendants'
17 counsel is that it's Facebook records related to some state
18 co-defendants and some other stuff primarily I think related to
19 uncharged in-state defendants. But I don't know the volume of
20 that, and so that's separate from Ms. Kelly's client's phone,
21 and that I understand the drive is with the Government and
22 hasn't been returned to the CDA yet.

23 My view is the coordinating discovery attorney has
24 saved us quite a lot of time overall in putting the discovery
25 together in a way that allows us to efficiently review it.

1 There are just some logistical challenges because every piece
2 of discovery she has to send a drive to the Government. It
3 goes back. She has to process it and push it back to us, and
4 it takes some time. I expect we are going to get another drive
5 from the discovery attorney once she receives it back from the
6 Government that's going to have more content on it that will
7 have to be reviewed.

8 I think for me the issues -- we have the transcript
9 issues for Mr. Croft. I think that's primarily an impeachment
10 matter. I think we have far less substantive evidence we are
11 going get in through transcripts, but we do need to have those
12 prepared for impeachment purposes as we go to trial.

13 I think the expert issue that's been publicly flagged,
14 you know, I understand the Court's view that it started out a
15 consulting expert. And you know, based on my conversations I
16 think it turned into needing to be a testifying expert and we
17 have to find someone on that front and so that's taking some
18 time for us.

19 I think additionally we have some witness issues that
20 I don't think anyone has flagged, that one of the Government's
21 informants yesterday -- so one of the Government's informants
22 was indicted by the Government in the Western District of
23 Wisconsin, and yesterday he filed a notice that he has resolved
24 the case by plea. They don't have a plea agreement on file.
25 Something about mail issues. But in any case, that case is

1 resolving. I think we are going to have very sticky Fifth
2 Amendment issues with that witness that may just resolve as a
3 result of his case having resolved in Wisconsin, and so an EOJ,
4 I think, will help us to avoid some of those issues at trial.

5 And then, of course, we are still -- like the
6 Government said, they are still doing witness interviews. At
7 least for Team Croft we are actively out interviewing witnesses
8 still, and we have some work to be done on that, and so I think
9 an EOJ is appropriate because I think at bottom we are just not
10 at a place, despite everyone's best efforts, where we're able
11 to try the case in an efficient and effective manner right now.
12 I think with some time we can have a tighter, more efficient
13 trial, which is my preference. I was going to propose, you
14 know, a late January, early February trial date. I frankly
15 hadn't considered the Court's observations about weather. I
16 suppose since Mr. Graham's change of venue motion was denied a
17 Florida trial is out of the cards, but -- so I can appreciate
18 the weather issues I hadn't thought about, but I think pushing
19 the trial some period of time is appropriate.

20 THE COURT: Okay.

21 MR. BLANCHARD: Thank you.

22 THE COURT: Thank you.

23 Mr. Hills, the last seven-defendant trial we were in
24 you were always at the end of the line, too. I don't know what
25 it is.

1 MR. HILLS: I think it was eight actually. I think it
2 as eight.

3 THE COURT: Was it? I can remember seven.

4 MR. HILLS: It was eight then. It's okay. What's
5 left for me to say I am not sure. I would agree with
6 everything that's been said. I think that Team Fox over there
7 is working through their transcripts and their cue and so Team
8 Caserta is kind of at the bottom of that after they get through
9 their's. I have got some we're working on overlap there to
10 make sure we get done, so I am kind of at the back of that. If
11 they are done in December, mine might be done late December I
12 guess. So that's a big problem for us.

13 Problems for us are the discovery that keeps coming.
14 I think everybody on the Defense team, we've tried to work
15 together as much as we can. We all, I think, were focused on
16 an October trial date and came together just before we filed
17 this, and I think we all kind of came to the realization that
18 in the interests of our clients we cannot be ready for trial
19 with the amount of discovery that we have, with the preparation
20 that we have, with the investigators out running down witnesses
21 that's going on. Everybody is working together, working hard.
22 I don't feel like I can be ready October 12th.

23 THE COURT: Okay. Yeah. Thank you.

24 Let me go over to the Government and get your overall
25 sense of these things, Mr. Kessler, and then I am also going to

1 have some questions for you, the kinds of things we talk in
2 detail about at final pretrial next week, but just to get sort
3 of a preview. You know, how long do you think your proofs are
4 going to take based on what you know now? That kind of thing.
5 Because that will also inform how difficult it's going to be if
6 we move it to find another block of time. I think we got the
7 October block when we were anticipating three to four weeks,
8 for example. That's not easy to slot in with a trial court's
9 schedule, but you can either talk to me about that in your
10 initial presentation here or just wait and I'll have questions
11 for you, but go ahead.

12 MR. KESSLER: I would really rather just answer
13 whatever questions you have, Your Honor. As I mentioned, we
14 are not opposing -- we are not opposing their motion for a
15 continuance. I don't know, you know, that months and months is
16 really necessary. As you pointed out, a lot of what they, you
17 know, might intend to use by way of transcripts is going to be
18 inadmissible because it simply doesn't qualify as admissions of
19 a party opponent. You can't put in self-serving statements
20 that way. I leave that up to them, you know, what they think
21 they are going to be able to try to use.

22 THE COURT: Well, if there is something on there that
23 amounts to a present sense impression.

24 MR. KESSLER: It would still -- obviously we are going
25 to end up briefing this, but you can't shoehorn in your own

1 basically -- Mr. Graham tries to draw a distinction between
2 saying, I didn't do it, and basically saying, I didn't have the
3 intent to do the kidnapping, which is saying, I didn't do it.
4 And the case law is very clear that you can't shoehorn in your
5 own self-exculpating statement under Rule 802.

6 THE COURT: Right. And I am not even focused on that
7 so much, and if it's what Mr. Gibbons was referencing then
8 probably we'll probably be in a similar place to where we often
9 are, but I haven't listened to these tapes so I don't know
10 exactly what they are talking about.

11 MR. KESSLER: Right. You know, one thing to throw out
12 there for what it's worth, we maybe took a little different
13 approach than it seems like they are taking in terms of trying
14 to figure out what we needed to transcribe, because if you
15 started from the beginning and tried to transcribe all the tape
16 anybody ever made you are wasting a lot of time then. You
17 know, there are hours and hours of tape where somebody might
18 have a recording device on them and attend a six-hour meeting
19 where there is nothing but scrunchy pocket noises and
20 occasional discussions about things unrelated to the case for
21 hours. And it makes sense to listen to the tapes first, figure
22 out what it is you want to use, and then have those people
23 transcribe only that, rather than, you know, try to transcribe
24 everything and then read it to decide what you want to use.

25 THE COURT: All right. Well, on the questions, then,

1 in round numbers, what do you think we are looking at in terms
2 of trial days or weeks for your case?

3 MR. KESSLER: Yeah. My best guess would be three
4 weeks. It could be less. Again, you know, the length of our
5 presentation is actually going to depend somewhat on how much
6 cross examination we have. And if you have five Defense
7 attorneys covering the same ground over and over again it's
8 going to take a long time. My experience, and I'm sure yours
9 as well, that that tends of speed up after a little while. So
10 it's, you know, possible it could be shorter than that.

11 THE COURT: All right. Well, you know, I will say
12 this. At both tables, the Government table with you,
13 Mr. Kessler, and then every one of the Defense lawyers have
14 been in here on trial matters with me including most of the
15 Defense lawyers on some fairly extended ones.

16 MR. KESSLER: Yeah.

17 THE COURT: Whether it was seven or eight defendants,
18 I don't remember, Mr. Hills, but a lot, and I was really
19 worried about exactly what you talked about that we are going
20 to have seven or eight cross exams that were basically the
21 same, and to their credit in that group they didn't do that.
22 It was quite an effective overall joint presentation, and I
23 think that an experienced group of lawyers on both sides is
24 likely to facilitate that. I hear what the Defense is
25 concerned about in terms of trying to marshal the proofs they

1 believe they need or at least want to be -- probably to proffer
2 whether it gets admitted or not. So you know, every estimate
3 is a bit of a guess, but thinking in the three-week range is a
4 reasonable judgment from where you sit?

5 MR. KESSLER: Yes, Your Honor. I think optimistically
6 I am hoping to be able to do it in less, maybe two. That would
7 be if everybody is doing what you said, not asking the same
8 stuff over and over again. I think it would be safer to go
9 with three rather than run into something where we have to
10 split it up and come back.

11 THE COURT: Okay. I know final pretrial isn't until
12 next week, and I know final pretrial is always a deadline, and
13 try as each side might -- and even a normal case rarely is
14 everything ready or at least as ready as I'd like it to be. I
15 get that. But has there been any progress? In other words,
16 have you -- have you tendered any subset of exhibits yet or are
17 we still basically, you know, at ground zero on preparation for
18 next final pretrial?

19 MR. KESSLER: No, no, no. As far as preparation,
20 there is a difference between preparation and tendering,
21 because as we've discussed in that last motion hearing we had,
22 we do not intend to tender a witness or exhibit list until --
23 definitely don't want to do it now if the trial is in February.

24 THE COURT: Well, I didn't mean to suggest you weren't
25 preparing, but in terms of what the Defense has seen it's

1 nothing yet?

2 MR. KESSLER: Right.

3 THE COURT: In other words, they won't see it until
4 next Friday if we have the final pretrial?

5 MR. KESSLER: Whenever the final pretrial conference
6 is, yes, sir, we are ready. We are prepared to do it for next
7 Thursday.

8 THE COURT: And round numbers, how many exhibits are
9 we looking at?

10 MR. KESSLER: Probably around 200.

11 THE COURT: Okay. In terms of Jencks disclosures,
12 have the parties talked about timing on that? Obviously, the
13 law doesn't require you to do it until after direct exam.
14 That's certainly not my preference because that's going to have
15 a lot more interruption than Mr. Van Dyke walking in on the
16 audio bridge, but has there been discussion? Is there an
17 agreement on what you anticipate?

18 MR. KESSLER: We don't have an agreement on a date
19 because we don't know what the date of the trial is going to
20 be.

21 THE COURT: It could be T-minus three days or it can
22 be two days before the witness testifies or whatever else you
23 haven't --

24 MR. KESSLER: What I'd like to do is do it after the
25 final pretrial conference. If we were to go on October 12th,

1 we are planning to turn over most of that after the final
2 pretrial conference.

3 THE COURT: But before trial actually?

4 MR. KESSLER: Oh, yeah. We are talking, like,
5 probably two weeks before the trial.

6 THE COURT: All right. And in terms of volume, I
7 mean, roughly how much do you think we have in terms of Jencks
8 material that you'll be handing over?

9 MR. KESSLER: That's always a hard question to answer
10 because I can't do it in terabytes or think that way, but
11 transcripts as to testifying witnesses who have been in trial.
12 There is stuff from there -- there is Giglio materials from --
13 like, they've asked for files of confidential informants that
14 haven't been disclosed. I don't think any of it is stuff
15 that's going to, you know, you'd have to sit there and need a
16 month to read it. A couple days. Day or two. I couldn't tell
17 you the size, weight, you know, in terms of gigabytes.

18 THE COURT: All right. My last question, and I'd like
19 to get the Defense input on this, too, as I hear everybody
20 talking today, I can sense that we are going to have more than
21 the usual amount of evidentiary issues that, you know, a
22 regular pretrial would flag and largely resolve. For example,
23 if we are going to have a lot of proffered statements of a
24 Defendant substantively, affirmatively from one theory or
25 another, and the Government is going to object on hearsay, is

1 that the kind of thing that we can and should have deadlines in
2 advance of whatever our final pretrial is for briefing and
3 argument? Is that useful, helpful to the parties?

4 Similarly, experts. I saw the Government did their
5 expert disclosures earlier this week. If the Defense is going
6 to have affirmative experts they have the same discovery
7 obligation. If you've made the request, and I think you did,
8 you know, do we need to put some deadlines out there so that
9 everybody at both sides of the table know when the expert
10 disclosures are coming in case there is a basis to challenge?
11 Do you have a view on that one way or the other, and if so, how
12 much time in advance of a final pretrial?

13 MR. KESSLER: I think it's a good idea, Your Honor, so
14 yes. I think it should be sufficiently in advance of the final
15 pretrial to give us a chance to respond, because I don't want
16 to be getting motions to either exclude or introduce evidence
17 that are controversial a week before the final pretrial and
18 then we are spending, you know, the last couple of -- or we're
19 having to ask for a continuance because we need more time to
20 brief an issue right before the trial. So you know, maybe in a
21 couple weeks or a month before the final pretrial. We normally
22 would get 30 days to respond to a dispositive motion.

23 THE COURT: You get 14 days for a motion in limine
24 presumably.

25 MR. KESSLER: You know, the problem the last time

1 around when we had to ask for a continuance to respond is we
2 got 12 motions all at once. So that's what I am a little leery
3 about is we get 12 motions a week or two before the final
4 pretrial, and 14 days is fine if we got to respond to one
5 motion, but it becomes very difficult if I have to respond to a
6 dozen.

7 THE COURT: That's what Mr. Hakes is there for.

8 MR. KESSLER: A half a dozen. Right.

9 THE COURT: All right. Anything else from the
10 Government perspective?

11 MR. KESSLER: The only thing I would just put on the
12 record as far as our expert disclosures, to the extent you are
13 considering that, are very very basic. It's basically an ATF
14 agent saying the barrel is ten inches or someone saying the gun
15 powder is explosive. Things like that. I don't think those
16 should enter into the consideration.

17 THE COURT: Okay.

18 MR. KESSLER: Thank you, Your Honor.

19 THE COURT: Let me go -- let's go to the same order.
20 Mr. Graham, anything you want to follow up, and in particular
21 your view of whether it would be useful to have some
22 incremental deadlines for briefing some of these issues? And
23 then the last thing I am going to ask every Defense lawyer is
24 just to confirm for me right now with your client that if I
25 grant this ends of justice, you know, they are on board.

1 MR. GRAHAM: Sure.

2 THE COURT: Because as one of you said, I don't
3 remember who, it's coming out of their hide in part. They are
4 all sitting here today in orange jump suits, and they are all
5 staying in Newaygo until we start this thing. And you know, I
6 am confident that all of the experienced Defense lawyers have
7 given their best advice and judgment, but it's also true that,
8 you know, we are all lawyers or judges or recovery lawyers
9 basically. There is never enough time. We always want more
10 until finally we have to show up at trial and do it, so...

11 MR. GRAHAM: Understood, Your Honor. In regards to
12 the question of should there be briefing? Yes. I think there
13 should be. If the Court -- well, whether the Court grants the
14 EOJ or not there should be a briefing schedule, I think, so we
15 can get all of these things hammered out. The question of the
16 Government receiving 10 or 12 motions at once -- I mean, I
17 understand the problems that come in. It's not only Mr. Hakes.
18 It's the other 15 people in that office that would jump in and
19 help. I guess I just feel compelled to say that. They can
20 respond. They'll find the resources to respond.

21 The only question I had was I think you were asking
22 Mr. Kessler about is there anymore discovery? And he was
23 saying, well, as we continue interviews there will be, and of
24 course there will be, but I don't know if I heard an answer, at
25 least I didn't understand, about the basic question of current

1 Rule 16 discovery. Has that all been, you know, produced? Not
2 a question of whether there will be more. I guess I'd be more
3 comfortable if we were rock solid that whatever is required
4 under Rule 16 has, in fact, been produced, and so maybe I
5 missed it and I apologize if I did.

6 THE COURT: All right. I don't know if I specifically
7 asked that or not or if you are able to say one way or the
8 other.

9 MR. KESSLER: All I can say is, you know, we are
10 going -- we're always in this catch 22, more in this case than
11 I've ever been in before, where we've had multiple pleadings
12 from the Defense basically accusing us of withholding stuff,
13 and we have litigated that last week. If we look at something,
14 whether it's coming from the state or wherever, and we go, you
15 know, what -- let's just give it to them. We want to make sure
16 that they have everything, and so we are in that catch 22 of we
17 look at something, I don't think this is really relevant, but
18 we are -- you know, in the interest of caution we are going to
19 give it to them, and then we find ourselves back here being
20 accused of, like, having sandbagged or held onto that for a
21 long time. So we have given them the vast majority of
22 everything, and we have little scraps here and there like that
23 we are going to keep giving them. I don't want to say we are
24 done. I don't, really don't, because if I stand here and tell
25 the Court we are done, then as soon as I give them something

1 else that I think they should have we are going to be back here
2 being accused of having held onto it.

3 THE COURT: Well, you know, I guess one person's scrap
4 is another person's, you know, smorgasbord. Is there anything
5 on the shelf that you are saying, you know, the day before
6 final pretrial this is what we are going to have or is it
7 really just continuing to see things flow across your desk that
8 are new and say, you know what, I should pass this on?

9 MR. KESSLER: I can say that for the vast majority of
10 it. This next production, what they're calling a dump, we are
11 doing them in tranches as we get everything together will be
12 the last really substantive one other than Jencks and Giglio,
13 which we are going to do later and just things that come across
14 our desk.

15 THE COURT: So vast majority, and for the most part
16 those are always the words that make me nervous if I am
17 standing where Mr. Graham is. I mean, are you able to -- give
18 me an example of something you are talking about other than the
19 new information that might come from one of the state
20 defendants for example?

21 MR. KESSLER: That's really pretty much it is going to
22 be. This next bunch has a bunch of things that there is that
23 parallel state investigation and we wanted to make sure they
24 have all of that. So that's that one that will have, you know,
25 a little bit of meat to it. But now if we're talking about

1 pushing this thing off, it's not the kind of thing that's going
2 to take months to review. And then after that, like I said,
3 it's Jencks and Giglio and new stuff.

4 THE COURT: All right. Okay. I am not sure you are
5 going to get a more direct answer than that, but that gives
6 you --

7 MR. GRAHAM: It gives me an understanding. It doesn't
8 answer my question at all. My question was simply -- I am not
9 worried about new stuff. Whatever they think as of this moment
10 in time have they fulfilled their obligations under Rule 16? I
11 mean, that was my question. This thing about there is going to
12 be a new production, I wasn't aware that a new production --
13 that's not -- that's not Jencks?

14 THE COURT: Well, it sounds like that's what
15 Mr. Blanchard was referring to as the dump that's -- or either
16 at or about to be at your coordinating counsel's office.

17 MR. GRAHAM: If that's the one, I understand.

18 THE COURT: Is that what you are talking about?

19 MR. KESSLER: Yes.

20 MR. GRAHAM: If it's one that's coming, okay,
21 understood. My question was simply have you complied with Rule
22 16? Of course new stuff is going to come up. I got my answer.
23 I just want to be sure on that.

24 And then if I could, Your Honor, I'd ask --

25 THE COURT: Sure.

1 MR. GRAHAM: -- a couple of questions of Mr. Franks if
2 I could?

3 MR. KESSLER: Can I sit, Your Honor?

4 THE COURT: Go ahead.

5 MR. GRAHAM: If you can stand up and get as close as
6 you can to that microphone?

7 THE COURT: Or you can stay seated if it's easier.
8 The microphone is more down at sitting level.

9 MR. GRAHAM: Kaleb, do you understand that we are here
10 today because we've asked for additional time moving the trial
11 off from the October 12 date; do you understand that?

12 DEFENDANT FRANKS: Yes.

13 MR. GRAHAM: And do you understand that you have a
14 right to have us go to trial on October 12th or at least tell
15 the Court we want to go to trial on October 12th?

16 DEFENDANT FRANKS: Yes.

17 MR. GRAHAM: And do you understand that if, in fact,
18 the trial date is moved, then you remain in custody and the
19 Court would set a date that was convenient for the Court's
20 schedule and the Court's decision about when the trial should
21 occur?

22 DEFENDANT FRANKS: Yes.

23 MR. GRAHAM: And that could be 90 days, 120, 150 days.
24 Do you understand that?

25 DEFENDANT FRANKS: Yes.

1 MR. GRAHAM: Do you understand you'll be in custody
2 during that time?

3 DEFENDANT FRANKS: Yes.

4 MR. GRAHAM: Based upon every -- I don't want to go
5 into what we've talked about. Based upon everything that you
6 know and your understanding of the situation, are you asking
7 the Court to go ahead and adjourn or move the trial date to
8 whatever date the Court finds appropriate?

9 DEFENDANT FRANKS: Yes.

10 MR. GRAHAM: Those are the questions I have.

11 THE COURT: Yeah. Thank you. Anything else from your
12 perspective, Mr. Graham?

13 MR. GRAHAM: No, Your Honor. Thank you.

14 THE COURT: Let's go to Ms. Kelly.

15 MS. KELLY: Thank you, Your Honor. I would also agree
16 with the briefing deadline. I think that would be a great idea
17 to help us organize. I didn't have any additional information
18 to add. I can certainly have my client go on record at this
19 time.

20 THE COURT: And your client is Mr. Harris, right?

21 MS. KELLY: Correct.

22 THE COURT: And if you want to do the same thing that
23 Mr. Fox -- Mr. Graham did, I would appreciate that, because as
24 I said, I have never met these men before. This is the first
25 time I've had a chance to be in the same room with them, and so

1 I want to make sure they are tracking and are on board with
2 what the Defense group wants to do here.

3 MS. KELLY: Okay. Mr. Harris, you and I had a
4 conversation prior to the Defense counsel filing a motion to
5 adjourn the trial date. Do you recall that?

6 DEFENDANT HARRIS: Yes, ma'am.

7 MS. KELLY: Okay. And you understand that you have a
8 right to have that trial -- your trial begin on October the
9 12th?

10 DEFENDANT HARRIS: Yes.

11 MS. KELLY: And you and I discussed reasons why we may
12 want to adjourn that, is that right?

13 DEFENDANT HARRIS: That's correct.

14 MS. KELLY: Okay. And you have heard the Court talk
15 about there may be issues. We have asked for 90 days. There
16 may be issues with weather, and the trial with the Court's
17 convenience might be moved past that 90-day time period?

18 DEFENDANT HARRIS: Correct.

19 MS. KELLY: Are you in agreement in consenting to our
20 request to adjourn that trial date?

21 DEFENDANT HARRIS: Yes, ma'am.

22 MS. KELLY: Thank you, Your Honor.

23 THE COURT: Anything else, Ms. Kelly?

24 MS. KELLY: No, Your Honor.

25 THE COURT: I think you were next, Mr. Gibbons.

1 Anything else you want to address, talk to me about what you
2 think of a briefing schedule, and then let's hear from Mr. Fox
3 on his point of view.

4 MR. GIBBONS: I strongly would encourage and support
5 the idea of a briefing schedule, especially with respect to the
6 evidentiary issues that I think are inevitably going to arise
7 in trial, and I think much -- the only other thing I wanted to
8 say is in response, Mr. Kessler had indicated that maybe we
9 were just sending audio unheard to the court reporter. I can
10 assure you we've listened to it all, unfortunately. And we
11 have --

12 THE COURT: All those scratching pocket hours.

13 MR. GIBBONS: You have no idea, Your Honor. But we
14 have reduced those to clips, so we are not sending wholesale
15 audio over to the transcriptionist. I wanted to make that is
16 clear. I don't want to have diminished I think the work that
17 everyone has done to get to that point, and then I will
18 continue with my client --

19 THE COURT: Sure.

20 MR. GIBBONS: -- Mr. Fox. Mr. Fox, I have come to see
21 you on September 8th?

22 DEFENDANT FOX: Yes, that's correct.

23 MR. GIBBONS: And we talked about the prospect of a
24 continuance at that time, is that true?

25 DEFENDANT FOX: Yes, sir.

1 MR. GIBBONS: And we have -- we were able to discuss
2 your concerns and my concerns regarding that?

3 DEFENDANT FOX: Yes, sir.

4 MR. GIBBONS: And you've heard everything that was
5 said here today?

6 DEFENDANT FOX: Yes, I have.

7 MR. GIBBONS: And you are willing to consent to the
8 Court --

9 DEFENDANT FOX: Yes.

10 MR. GIBBONS: -- on continuing this case?

11 DEFENDANT FOX: Yes. I agree to that.

12 MR. GIBBONS: And do you understand that you will be
13 lodged in the county jail up in Newaygo until that happens?

14 DEFENDANT FOX: Yes, I do.

15 MR. GIBBONS: And you are willing to do that?

16 DEFENDANT FOX: I am willing to do that, yes, sir.

17 MR. GIBBONS: Thank you.

18 THE COURT: Thank you, Mr. Gibbons.

19 Mr. Blanchard?

20 MR. BLANCHARD: I guess as to the question of briefing
21 deadline I think it's a good idea. I don't know that a
22 month -- I can appreciate the Government wants time. I am just
23 thinking about as these things normally come up they get closer
24 to final pretrial and so I think maybe something a little bit
25 shorter than a month, but I think having a briefing deadline

1 would be helpful to keep the trial on track and efficient so
2 that we don't spend, you know, four weeks in the Government's
3 case fighting over evidentiary issues that are coming up at
4 trial. So I think that's a great idea. And then I can inquire
5 of my client --

6 THE COURT: Okay.

7 MR. BLANCHARD: Mr. Croft, I came to the jail and met
8 with you to discuss the issue of the EOJ before we filed the
9 motion, is that right?

10 DEFENDANT CROFT: Yes.

11 MR. BLANCHARD: And I gave you my advice on what I
12 thought we ought to do with the motion and whether it was in
13 your best interests?

14 DEFENDANT CROFT: Yes.

15 MR. BLANCHARD: After having that conversation, you
16 gave me permission to consent to the EOJ and to seek it,
17 correct?

18 DEFENDANT CROFT: Yes, sir.

19 MR. BLANCHARD: After hearing everything that happened
20 here today, do you still support a continuance?

21 DEFENDANT CROFT: Yes, sir.

22 MR. BLANCHARD: You understand that you will continue
23 to be detained during the period of the continuance?

24 DEFENDANT CROFT: Yes, sir.

25 MR. BLANCHARD: I have nothing else, Your Honor.

1 THE COURT: All right. Thank you.

2 We'll go to Mr. Hills.

3 MR. HILLS: Thank you, Your Honor. I think a briefing
4 schedule is a good idea. No objection. Whether it's 30 days
5 or whatever the Court sets I am good with that.

6 THE COURT: Okay.

7 MR. HILLS: And I would ask of my client.
8 Mr. Caserta, before we filed the EOJ motion, I came to speak
9 with you at the Newago County Jail, is that right?

10 DEFENDANT CASERTA: That is correct.

11 MR. HILLS: We discussed the issue of continuing the
12 case. Do you recall that?

13 DEFENDANT CASERTA: Yes.

14 MR. HILLS: You understand that the trial and you know
15 that the trial is currently scheduled for October 12th?

16 DEFENDANT CASERTA: That is correct.

17 MR. HILLS: And are you in agreement, after discussing
18 the issues with me, to a continuance to have the trial reset at
19 a date that's convenient for the Court?

20 DEFENDANT CASERTA: Yes. I am in agreement with the
21 continuance.

22 MR. HILLS: Okay. And you understand that you are
23 going to be held in Newago County Jail during that time until
24 the Court sets the trial date we have for trial?

25 DEFENDANT CASERTA: Yes, I understand that.

1 MR. HILLS: Okay.

2 THE COURT: All right. Well, thank you.

3 Anything else, Mr. Kessler?

4 MR. KESSLER: Just one additional thought on the
5 timing, and this isn't about giving us sufficient time to
6 respond. One other thing tends to happen towards the end. I
7 know everybody in this room, including the Court, has seen this
8 pattern play out. And I don't expect anybody in this room to
9 say anything other than my client intends to go to trial, but
10 sometimes people are making a decision about whether they want
11 to go to trial or they want to cut a deal based on whether or
12 not -- how those motions go, and I think if somebody finds out
13 or is, you know, at the very last minute that all the evidence
14 they thought was going to exculpate them or allow -- you know,
15 allow them to make a defense is inadmissible, that's pretty
16 late for them to have that information to make that decision.
17 So there is an additional benefit to them knowing how those
18 things are going to come out earlier rather than later.

19 THE COURT: All right. Well, thank you. And I don't
20 have any other questions for the Government.

21 MR. KESSLER: Thank you.

22 THE COURT: On the last point, the only thing I am
23 thinking about, and I think the only thing I should properly
24 think about in terms of the schedule is a deadline -- series of
25 deadlines that will facilitate the smoothest possible trial

1 presentation at both tables, and the Defendant always has the
2 right to decide not to go to trial and to try to cut a deal,
3 but that's not something I am going to get in the middle of.
4 That's between Defense Counsel, Defendant, and the Government.
5 What is my responsibility is to make sure that if we go to
6 trial with this array of people, which is what we have right
7 now, I am doing it all odds in favor of smoothness, success and
8 obviously fairness to all sides. So that's really where I want
9 to start.

10 As I said, you know, a three, four-week trial block is
11 not easy for a trial court to carve out, and I know all of us
12 have been focused on that October block for quite some time
13 now, and I really hate to give it up. With that said, you
14 know, I've got five experienced defense lawyers, all of whom
15 have a lot of experience in this Court and other -- my
16 colleagues' courts, and they are telling me to a person they
17 don't feel like they'll be ready, but -- to provide the defense
18 that they need by October 12, and that carries significant
19 weight. Whether I agree or disagree with every particular
20 reason articulated, I trust the judgment of these five lawyers,
21 and I have seen them tell me straightaway in other situations
22 when they think they need more time or when they think that
23 they'd like it but they can proceed, and today I am hearing
24 from every one of them and now their clients we think there is
25 good reason to wait.

1 At the Government table I hear we don't see any
2 prejudice to our case in waiting. You know, we don't think we
3 are responsible. We don't think that everything the Defense
4 has said about the disclosure sequences is entirely accurate,
5 but we acknowledge there is a lot of material, and we don't
6 feel like we'll be prejudiced, at least until they have to
7 start making the disclosures that would be a part of final
8 pretrial. And when I put those two things together, and third,
9 I think about what is necessary, potentially anyway, from an
10 evidentiary sifting point of view to make the trial smooth,
11 whether that's through motions in limine or otherwise on some
12 of the transcription issues we talked about, and what
13 affirmative statements of individual Defendants might be
14 admissible or not as substantive evidence, we just don't have
15 time anymore between now and next Friday or even October 12 to
16 meaningfully process that if the transcripts themselves aren't
17 going to be available until mid-December, at least for some of
18 the Defendants. Not until the end of December for others.

19 So I think that -- I guess the final thing is I did
20 reference and we didn't talk specifically about all the expert
21 issues. There is one that was submitted ex parte today, and
22 another one that we talked about on the record. To the extent
23 the Defense believes in good faith that they need affirmative
24 testimony on some issues and haven't been able to line up
25 experts, even though they were able to get consulting experts,

1 it seems to me we ought to give them a chance to do that. It's
2 not an indefinite time. If you can't get it lined up between
3 now and the next time we set trial maybe that's not another
4 good reason for yet a further extension, but it does augur in
5 favor of some additional time now.

6 Finally, we didn't talk anything specifically about
7 it, but the Court did note that on the record there was an
8 appeal of the Magistrate's order on one of the issues that got
9 filed late yesterday. So I'll have to have time to take that
10 into account, and obviously, depending on what I do with it --
11 lawyers all know the standard of review is very differential to
12 what the Magistrate Judge decides on that, but if there are any
13 changes, that would certainly affect what gets disclosed or
14 not.

15 Lastly, there is at a minimum for one of the
16 Defendants, Mr. Harris, recent disclosure of his own phone
17 contents, and although it's not anybody's fault in
18 particular -- sometimes some phones are hard to decrypt or
19 extract and harder than others. The reality is for Ms. Kelly,
20 you want to know what's on your client's phone and what could
21 be used either to exculpate or what the Government could use in
22 an affirmative way.

23 So I think there is, all told, reason to support an
24 ends of justice continuance as requested by the Defense, even
25 though I am not glad to give up that October date. What I'll

1 do -- and I don't know what the dates will be today as I sit
2 here. What I'll do is I'll go back to the calendar, try to
3 sort out what I think would be some meaningful briefing
4 deadlines, taking into account the Defense experts to get their
5 transcripts by mid-December, which would be, I think, essential
6 to frame meaningful briefing on the issue, and then we'd do
7 final pretrial far enough down the line to allow resolution of
8 most of those issues in advance or not too long into a final
9 pretrial, and then finally we'd put the trial date on in the
10 same roughly three-week period or so following final pretrial.
11 As I said, I don't think that trial date is likely to be before
12 mid-February, maybe end of February or maybe even early March,
13 and I'll put that all out there for the parties in an order if
14 not today then early next week so you all know what to figure
15 out, but at least you know you won't have the final pretrial
16 next Friday. That doesn't mean you can't spend time working
17 together, but you won't have final pretrial next Friday. We
18 won't have trial starting October 12. We will grant the ends
19 of justice continuance and assorted other deadlines to
20 facilitate some meaningful briefing on the evidentiary issues.

21 That's the motion for today. Are there other things
22 that would be useful to take up for the parties, just practical
23 logistics or otherwise?

24 MR. KESSLER: Just a thought on that when the Court
25 comes up with the timing for when things need to be done. I

1 noticed that there was some discussion about ex parte requests
2 for experts. The earlier we can find out who those experts are
3 and what they are expected to testify about, that'll help us be
4 able to brief those issues.

5 THE COURT: Sure. Anything else that would be helpful
6 from the Defense point of view today?

7 MR. GRAHAM: No, Your Honor.

8 MR. GIBBONS: Satisfied, Your Honor.

9 MR. HILLS: No.

10 THE COURT: You had filed, Mr. Gibbons, the request
11 for a status conference to address, at least my memory is I
12 think it would be logistic issues but -- or logistical issues,
13 how to present the transcripts, but I take it there is nothing
14 ready. We couldn't do a demo today anyway because it's not
15 ready.

16 MR. GIBBONS: No. We couldn't, Your Honor. Primarily
17 my interest was just making sure that they are exchanged in a
18 timely fashion before so that we have -- you know, I am just
19 envisioning we are in the middle of a trial and Mr. Kessler and
20 I don't agree on a transcript. You know, mine is right. He
21 says his is right. I can't imagine we are going to give it to
22 you with a clip and say, here, we need you to figure that out.

23 THE COURT: Typically not.

24 MR. GIBBONS: It may be a process -- because it's an
25 unusual case with the amount of audio that's present -- that

1 may be we disclose and exchange these in advance of trial and
2 as we have them. Obviously, if the Government has transcripts
3 I would gladly relieve Ms. Rozema of the obligation to do that
4 if we have any from the Government and it's fine. There is
5 just no reason to do it twice. Really, it's a time saving and
6 economic issue.

7 THE COURT: I think your plan at this point is to hand
8 over with the overall set of trial exhibits, the transcripts
9 that you think --

10 MR. KESSLER: Yes, Your Honor.

11 THE COURT: -- accurately -- so we are talking final
12 pretrial from your perspective?

13 MR. KESSLER: Yes, Your Honor.

14 THE COURT: Okay. All right. Well, if there is
15 nothing else today I am glad we were able to have an
16 opportunity to see everybody. Does the Defense group, as you
17 sit here today, you feel like you have enough room to set up
18 and will you have at trial the need for a separate table for
19 whoever is going to present your forensics?

20 MR. GRAHAM: Your Honor, we are going to definitely
21 need a separate table for whomever is going to present --

22 THE COURT: Okay.

23 MR. GRAHAM: -- from my perspective. Unless we feel
24 we need someone else up here with us it seems that from my
25 perspective there is enough room.

1 MR. BLANCHARD: If there is a way to add another
2 table, because I expect some of us will have someone with us at
3 trial, and we're tight right now.

4 THE COURT: Right. When we had the group of seven or
5 eight -- and I don't -- I know you were there, Mr. Hills. Was
6 anybody else at that one?

7 MR. HILLS: No.

8 THE COURT: A number of you -- I know you,
9 Mr. Blanchard, and Mr. Gibbons, were in a three-defendant
10 trial.

11 MR. BLANCHARD: Mr. Hills was also there.

12 THE COURT: You were there, too? Were you the last
13 one to go in that one?

14 MR. HILLS: No. I was the driver.

15 THE COURT: Okay. And we did manage, but that was
16 preCOVID and people were snug and we did manage to get seven or
17 eight groups of clients, lawyers and techies on that side of
18 the well of the Court. There is room behind the Government,
19 but you'll probably have your own person, right?

20 MR. KESSLER: Yes, Your Honor.

21 THE COURT: Okay. So we'll see if we can figure out a
22 better way to do it. We also have, since you all have been
23 here, I think, an upgrade, quote-unquote, on the tech. I hope
24 it's an upgrade. Certainly the screens present a much tighter
25 resolution. The projector a little better resolution but not

1 great. And then that big thing right in front of the
2 Government table is an experiment. What it does when it's on
3 is has a camera shot facing forward so you can see the witness,
4 the Court and then you can have inset whatever is displayed on
5 the evidence at the time. And you know, the AO --
6 Administrative Office's idea is sometimes it's hard for the
7 jury to always be looking at one direction if they want a
8 chance to see what the witness is looking at, like, along with
9 the evidence, and keep themselves facing forward they could
10 conceivably do that. So I don't know whether it's a good idea
11 yet or not. We are still kind of playing with it. You can
12 think about that as part. If we don't do that, we could
13 convert that to another stand-up monitor and either show it to
14 the jury or show it to the back of the room or show it to all
15 of you at Defense table who don't really have a great view of
16 the screen behind you. So think about some of those things as
17 well. Otherwise, I don't have anything on my list and we'll
18 see each other at whatever the next hearing is.

19 THE CLERK: Court is adjourned.

20 (Proceeding concluded, 11:23 a.m.)
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REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

Paul G. Brandell, CSR-4552, RPR, CRR

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